FIFTY YEARS ON: THE CURIOUS CASE OF INTERSECTIONAL DISCRIMINATION IN THE ICCPR

Shreya Atrey*

Abstract

2016 marked the fiftieth anniversary of the ICCPR and thus of the oldest self-standing general right to non-discrimination in international law under article 26. The Human Rights Committee has enforced the right with rigour creating a vast and formidable body of discrimination jurisprudence over the decades. This jurisprudence, though, is doggedly single-dimensional and appears to have given a short shrift to discrimination based on multiple and intersecting grounds of article 26, viz. race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This article examines the curious case of missing intersectional discrimination in the ICCPR. It does so by pulling together the dispersed and often unidentified claims based on more than one ground of discrimination. It delineates the pathologies of reasoning in these claims which have overlooked the idea of 'intersectionality' understood as disadvantage based on multiple and intersecting grounds, which is both similar to and different from disadvantage based on individual grounds. The article shows that this conceptual reckoning matters in identifying and addressing discrimination, and thus enforcing the commitment in article 26 of addressing not just single-ground discrimination but 'any discrimination' against 'all persons' on 'any ground…or other status.'

Keywords

ICCPR, Article 26, Optional Protocol, Intersectional Discrimination, Grounds.

1. Introduction

Under the International Covenant on Civil and Political Rights (ICCPR) has emerged the oldest and largest body of discrimination jurisprudence in international law.[1] On 23 March 1976, the ICCPR was the first core human rights treaty to come into force, and article 26 of the ICCPR became the first freestanding general right to non-

* Max Weber Fellow, European University Institute (Florence). DPhil (Oxon), BCL (Dist) (Oxon), BA LLB (Hons) (NALSAR).

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1 International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

discrimination which now binds 168 States Parties.[2] Article 26 prohibits discrimination in all spheres, not only in relation to the rights guaranteed under the ICCPR.[3] Unlike single-ground treaties like the Convention on the Elimination of All Forms of Racial Discrimination (CERD),[4] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[5] and the Convention on the Rights of Persons with Disabilities (CRPD),[6] it applies to a non-exhaustive list of grounds including eleven enumerated grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, and birth.[7] The Human Rights Committee (HRC or the Committee), established under Part IV of the ICCPR and mandated by the First Optional Protocol,[8] decided its first individual communication on the violation of article 26 as early as 9 April 1981.[9] It has since decided over 120 individual communications on merits under article 26 alone, single-handedly more than the entire body of jurisprudence of the CEDAW, CERD and CRPD Committees. Even the first ICCPR General Comment on non-discrimination and equality between sexes dates back to 30 July 1981, several months before the specific treaty on the subject – CEDAW – came into force.[10] The quality of the ICCPR discrimination jurisprudence too has been widely acclaimed as 'rich and dynamic'[11] and has, in substantive terms, yielded outstanding successes like extending the right to non-discrimination under article 26 to the realm of economic, social, and cultural rights;[12] including homosexuality[13] and nationality[14] as 'other statuses' in the list of prohibited grounds; extending the States' responsibility towards prohibiting private acts of

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2 The list of State Parties to the ICCPR, as of 20 November 2016, is available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 20 August 2016.

3 Cf ICCPR, art 2(1), which applies only in relation to the rights guaranteed under the ICCPR and arts 23–25 which guarantee non-discrimination in relation to particular rights.

4 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 196.

5 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

6 Convention on the Rights of Persons with Disabilities (CRPD) (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

7 Cf ICCPR, art 3, which specifically relates to equality between men and women.

8 Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. The Optional Protocol binds 115 State Parties. <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en> accessed 20 August 2016.

9 *Aumeeruddy-Cziffra et al v Mauritius* (1981) CCPR/C/12/D/35/1978.

10 HRC, 'General Comment No 18: Non-Discrimination' (1989) HRI/GEN/1/Rev.9 (Vol I).

11 'The Right to Equality and Non-Discrimination', Icelandic Human Rights Centre, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination> accessed 20 August 2016.

12 *Broeks v the Netherlands* (1987) CCPR/C/OP/2/1984; *Zwaan-de-Vries v the Netherlands* (1987) CCPR/C/OP/2/209/1984.

13 *Toonen v Australia* (1994) CCPR/C/50/D/488/1992.

14 *Gueye v France* (1989) CCPR/C/35/D/196/1985.

discrimination;[15] and upholding affirmative action as part of the right to non-discrimination.[16] In fact, as Joseph and Castan remark: '[s]ome of the most rigorous Optional Protocol decisions have concerned article 26,'[17] within the vast swath of ICCPR jurisprudence which is itself considered the 'lion's share of UN jurisprudence.'[18] Non-discrimination and equality has thus emerged as 'the single dominant theme of the Covenant'[19] that shines through its formidable legacy of fifty years.

On this impressive canvas appears an incredulous dent. The ICCPR jurisprudence remains largely ignorant of discrimination based on a combination of grounds. Neither does the text of article 26 nor does the more substantive statement on discrimination in General Comment No 18, mention anything explicitly about discrimination based on multiple grounds considered together. References to dual, multiple, combination, overlapping, compound or intersectional discrimination remain scarce in the Committee's decisions on individual communications.[20] The result being, that the vast discrimination jurisprudence produced under the First Optional Protocol of the ICCPR from 1981-2016, is characteristically unidimensional in its focus: concerning discrimination when it occurs only on the basis of one of the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In other words, it has turned a blind eye to 'intersectionality' or inequalities which occur not only on the basis of a single ground but on the basis of two or more intersecting grounds, for example, in case of unmarried female cohabiting partners – who have been one of the most persistent claimants before the HRC – on grounds of both marital status and gender.[21] This came to be corrected, at least in relation to women, in General Comment No 28 on article 3 (which relates to equality between sexes) where the Committee recognised that discrimination against women is often 'intertwined with discrimination on other grounds.'[22] This was the first mention of the idea of intersectionality in the Committee's discrimination jurisprudence. The second and the only other instance is the Committee's 2011 decision in *LNP v Argentina* where it agreed with the author's account of intersectional discrimination based on both sex and ethnicity.[23] *LNP* also marks the end of its engagement with

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15 *Love et al v Australia* (2003) CCPR/C/77/D/983/2001.

16 *Ballantyne v Canada* (1993) CCPR/C/47/D/359/1989.

17 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (OUP 2014) [1.72].

18 ibid [1.12].

19 ibid [23.01]

20 Wouter Vandenhole, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005) [36]. The jurisprudential analysis in this article is restricted to decisions under the individual communications procedure and does not span the state reporting mechanism.

21 See nn 69-72 and accompanying text.

22 HRC, 'General Comment No 28: Equality of Rights between Men and Women (art. 3)' (2000) CCPR/C/21/Rev.1/Add.10 [30].

23 *LNP v Argentina* (2011) CCPR/C/102/D/1610/2007.

intersectional discrimination under the individual complaints procedure which continues to decide discrimination claims devoid of intersectionality.

The result is puzzling because at least initially, this was not meant to be the case. Even before the term 'intersectionality' was coined in 1989, the first individual communication decided on article 26 in 1981 was specifically advanced as an intersectional claim based on multiple grounds. In *Aumeeruddy-Cziffra*, the authors claimed to be victims of discrimination not only on the basis of their sex but also on the basis of race and political opinion when their foreign husbands were denied residency by the Mauritian State.[24] Seminal claims of discrimination in relation to socio-economic rights, like *Vos (Hendrika S) v the Netherlands*[25] and *Broeks* too were explicitly argued on dual grounds of 'sex and marital status' and 'sex and status' respectively. The Committee paid scant attention to the significance of the interaction between multiple grounds in these communications despite of the fact that they were actually advanced as such. On the other hand, in claims where intersectionality potentially mattered, the fact that they were not actually argued in this way made the single-ground approach appear rather justified.[26]

So despite the considerable and credible ICCPR discrimination jurisprudence, intersectionality remains wanting from the record. This article is dedicated to examine this anomaly in the particular context of the First Optional Protocol. It surveys the vast array of individual communications decided under the Optional Protocol concerning article 26 and picks through the lines of reasoning adopted in actual and potential claims of intersectional discrimination. The purpose is to learn how intersectionality remains underappreciated and importantly, why it matters to subject multi-grounds claims to an intersectional analysis. Section 2 identifies the kernel of intersectionality and intersectional discrimination and sets the perspective for the forthcoming discussion. Section 3 takes stock of article 26 claims which were either argued on multiple grounds or could have been, based on what is apparent in the Committee's analyses of these claims. It establishes the curious case of the short shrift given to intersectionality implicated in multi-ground discrimination claims. In Section 4 an explanation follows for why it is important to understand and address intersectionality and intersectional discrimination under article 26. The central argument is that it matters in an instrumental way in addressing discrimination claims such that they succeed in identifying and responding to complex patterns of group disadvantage, and thus enforcing article 26 under international law per se. In the final analysis, the article shows the pathologies of reasoning which have contributed to an intersectionality-devoid discrimination jurisprudence and in turn, supplies a normative grounding for

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24 *Aumeeruddy-Cziffra* (n 9).

25 *Vos (Hendrika S) v the Netherlands* (1989) CCPR/C/35/D/218/198.

26 See discussion in Section 3.2 below.

altering this course by explaining the nature of intersectional discrimination, and pressing on the importance of addressing it as such under the ICCPR.

2. The Idea of Intersectionality

The vast and rich intellectual discourse on intersectionality can be traced back to over 150 years of Black feminist thought.[27] Its roots are firmly grounded in the Black feminist challenge to the normative conception of women as white and Blacks as male within the feminist and the civil rights movements. In defining groups and the disadvantage associated with them along a single-axis of sexism or racism alone, feminism and civil rights movement had erased Black women and their disadvantage from their progressive agendas. Black feminists thus decried the essentialist categories of women and Blacks which marginalised Black women who were afflicted not *only* by gender or race alone but by *both* of them at the same time. With this, Black feminism and intersectionality developed as a way to comprehend identity politics and the disadvantage associated with identities as complex and multi-faced—that is, resulting from the interaction of many coexisting and co-constituted disabling forces of sexism, racism, ableism, ageism, classism, heterosexuality, homophobia, transphobia, xenophobia, etc. Thus, the discourse contributed to an understanding of disadvantage or discrimination as defined not only by multiple and intersecting group-identities but by crosscutting 'systems of subordination'[28] or 'matrix of domination'[29] or 'politic of domination'.[30] This discourse expanded to categories, contexts and disciplines far beyond those of race and gender, the United States, and Black feminism.[31] Intersectionality travelled across continents, informing both theory and praxis in South America, Africa and Asia; categories, like Muslim women, Black LGBTQ and disabled Romas; and disciplines, including psychology, history, sociology, anthropology, political science, and political theory.[32] In the course of its development, the idea of intersectionality thus turned into 'a burgeoning field of intersectional studies' of its own.[33]

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27 Ange-Marie Hancock, *Intersectionality: An Intellectual History* (OUP 2016).

28 Kimberlé W Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241.

29 Patricia Hill Collins, *Black Feminist Thought* (2nd edn, Routledge 2009) 21.

30 bell hooks, *Feminist Theory: From Margin To Center* (2nd edn, South End Press 2000) ch 2.

31 See for a discussion of intersectionality as 'travelling' theory: Helma Lutz, Maria Teresa Herrera Vivar, and Linda Supik (eds), *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Ashgate 2011).

32 R Aída Hernández Castillo, 'The Emergence of Indigenous Feminism in Latin America' (2010) 35 Signs 539; Patricia Monture-Angus, Thunder in My Soul: A Mohawk Woman Speaks (Fernwood 1995); Elvia R Arriola, 'Gendered Inequality: Lesbians, Gays and Feminist Legal Theory' (1994) 9 Berkeley Women's Law Journal 103; Mary Eaton, 'At the Intersection of Gender and Sexual Orientation: Towards a Lesbian Jurisprudence' (1994) 3 Southern California Review of Law and Women's Studies 183.

33 Sumi Cho, Kimberlé W Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 Signs 785.

It is useful to remember then, that the term 'intersectionality' was introduced by Kimberlé Williams Crenshaw in her seminal article in 1989,[34] in the immediate context of the failure of Black women's discrimination claims in the US.[35] For example, in the locus classicus of *DeGraffenreid*, the claimants had challenged the 'last hired first fired' policy of General Motors as being discriminatory against Black women, on the basis of both race and sex. The District Court of Missouri declared that the 'lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.'[36] This the claimants failed to show. Their claim was neither of race and sex discrimination separately nor in the alternative but actually a combination of both. What they meant to show was that whilst neither Black men nor white women were fired because of their longer employment histories, the neutral policy specifically affected Black women because they entered employment last. But according to the Court, no such cause of action was available to Black women at all. In fact, to allow such a claim would have been to accredit a 'new special sub-category' or a 'special class' of Black women for the grant of a 'new "super-remedy"' beyond the contours of Title VII of the Civil Rights Act 1964 which prohibited discrimination on the basis of race, colour, religion, sex or national origin.[37]

Crenshaw described this as the dominant conception of discrimination which protected only those disadvantaged on the basis of a single ground (say sex) and privileged in every other way (race, class, disability, sexual orientation, age, marital status etc.).[38] This dominant conception was deficient in that it excluded claimants like Black women, for whom discrimination is defined by the intersection of at least two grounds, race and sex. She explained thus:

> Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men…And sometimes they experience discrimination as Black women… [39]

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34 Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139.

35 *DeGraffenreid v General Motors* 413 F Supp 142 (ED Mo 1976); *Payne v Trevanol* 673 F 2d 798 (5th Cir 1982); *Moore v Hughes* 708 F 2d 475 (9th Cir 1983).

36 *DeGraffenreid*, ibid 143.

37 ibid.

38 Crenshaw (n 34) 151.

39 ibid 149.

Herein lay the centrepiece of intersectionality theory described by Crenshaw: that the distinct nature of discrimination based on two or more grounds is both *similar to* and *different from* discrimination based on the grounds individually.[40] For example, the disadvantage suffered by poor Black women on the basis of their sex, race, and class—is similar to the disadvantage suffered by white women (on the ground of sex), Black men (on the ground of race) and poor people (on the ground of class), and also similar to the disadvantage suffered by the groups of poor white women (on the grounds of sex and class), poor Black men (on the grounds of race and class), as well as Black women who are not poor (on the grounds of race and sex). But they also suffer disadvantage which is different from all of them and thus unique to poor Black women *as* poor Black women (on the grounds of race, sex and class together). The particular nature of their disadvantage understood in terms of this complex dynamic of sameness and difference in patterns of group disadvantage defines the idea of intersectionality.

The category of intersectional discrimination reflects this idea of intersectionality for claims based on two or more grounds of discrimination considered together. It modifies the framework of single-ground discrimination—by first, including multiple grounds in a discrimination claim; and secondly, explaining the distinct nature of the resulting discrimination based on those grounds as similar to and different from that based on individual grounds. Thus, it provides a counter to the 'dominant ways of thinking about discrimination,'[41] by accepting that discrimination can be based on more than one ground, and by appreciating what it means when it does, i.e. produces similar and different patterns of group disadvantage when multiple grounds intersect. In this way, intersectionality transforms the causal basis of discrimination as understood to be linked to a single ground alone, to one which is based on multiple grounds simultaneously.

Whilst the idea of intersectionality has been both keenly supported[42] and critiqued,[43] its dissemination in international law as a category of discrimination itself has been slow.[44] Just as in 1989, the dominant structure of discrimination continues to be based

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40 Cho, Crenshaw, and McCall (n 33).

41 Crenshaw (n 34) 150.

42 Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581; Trina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 Berkeley Women's Law Journal 16; Darren Hutchinson, 'Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination' (2001) Michigan Journal of Race and Law 285.

43 Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in Grabham et al (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009); Robert S Chang and Jerome McCristal Culp Jr, 'After Intersectionality' (2002) 71 UMKC Law Review 485.

44 Johanna Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 Emory Law Journal 71.

on a single ground, with piecemeal attention to the connection between patterns of group disadvantage.[45] Commentators have continued to point out the gap between the vast developments in theory and its near absent implementation in international human rights practice.[46] Taking cue from this tipped balance, this article does not rehash the commendable strides made in intersectionality theory but takes a hard look at the international law practice of discrimination under the First Optional Protocol of the ICCPR to understand and address the ways in which intersectionality fails to materialise. It is specifically concerned with examining how the basic idea of intersectionality transpires within the realm of article 26 on the right to non-discrimination, and contributes to translating intersectionality into a legal category of discrimination under international law.

3. The Curious Case

To date, the HRC has decided over 120 individual communications on merits concerning article 26.[47] Almost a hundred of them are either based on no particular ground (hence invoking the general guarantee of equality as reasonableness or equal treatment) or a single ground if at all, and there is little on record in these communications to pull up on intersectionality. Statistically speaking then, these communications have occupied much of the HRC's attention. But almost a considerable sixth of its jurisprudence resonates with intersectionality in either of the two ways—that the claim was explicitly argued on multiple grounds; or even if it were not, the problem at hand was clearly an intersectional one creating indistinguishable patterns of group disadvantage based on multiple grounds, as apparent from the Committee's analysis. In neither case has the HRC's own response been intersectionality-friendly, other than the lone example of *LNP*. A systematic exploration of the reasoning in these decisions reveals how intersectionality has been missed and the nature of loss that results. Section 4 complements the forthcoming doctrinal analysis by drawing together the apparent structural hurdles for recognising intersectionality, and the significance of including it in the Committee's repertoire of discrimination analysis. The central argument is that it matters for the Committee to treat actual or potential intersectional claims *as* claims of intersectional discrimination to understand and address the diagnostic link in article 26 between a breach and its basis in certain grounds of discrimination which creates intersectional patterns of group disadvantage.

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45 Aisha Nicole Davis, 'Intersectionality and International Law: Recognizing Complex Identities at the Global Stage' (2015) 28 Harvard Human Rights Journal 205.

46 Pok Yin S Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 16 Human Rights Law Review 453.

47 The numerical figure relates to cases which were specifically decided on article 26 either alone or in conjunction with violation of other rights.

3.1 *Multi-ground claims of intersectional discrimination*

Claims which were explicitly advanced by the authors on two or more grounds of discrimination can be delineated into two sets: first, those which were argued but not decided on multiple grounds; and secondly, the individual communication in *LNP* which was argued *and* decided on multiple grounds as an intersectional claim. The distinction between the two approaches will become clear in the following analysis.

In the first instance emerge claims which were explicitly advanced on multiple grounds understood in an intersectional way but ultimately decided on a single ground alone. Five examples mark this theme. The first ever article 26 decision adopted by the Committee in 1981, signifies the initial possibility of advancing a claim in all its complexity without being limited to a single ground.[48] The authors in *Aumeeruddy-Cziffra* argued that the restriction on their foreign husbands to obtain residency in Mauritius was discriminatory not only on the basis of sex but also on the basis of race or political opinion.[49] While the State decided to justify the unequal status of the spouses of Mauritian citizens on the basis of race,[50] the authors explained that their discrimination claim was not so much about their spouses' race, as it was about the authors themselves *as* married women to not have their choices curtailed because of their partner's race or political opinion, or to have the partners deported or denied residence because of that choice.[51] Despite this explanation which earmarked several grounds including sex, marital status, race and political opinion as identifiers of discrimination, the Committee addressed the complaint as a matter of sex discrimination alone.[52] Whilst it found both the violation of article 23 (the right to marry) as well as article 26 as a matter of sex discrimination, an exploration of the claimant's case of specific disadvantage suffered by and as women married to foreign husbands remained unexplored in the Committee's analysis. Even though the claim succeeded, the Committee let pass the possibility to substantiate on the intersectional claim of similar and different patterns of disadvantage which accrued not just because the authors were women but particularly the disadvantages suffered by women in marriage, especially their choice of husbands and the impact of controlling that choice based on nationality or race.

This single-ground approach established in the debutant decision has been followed and cemented since. But early communications, just as *Aumeeruddy-Cziffra*, continued to try their luck by arguing intersectional claims on multiple grounds even when the Committee's response was bluntly unidimensional each time. Four claims against the

48 *Aumeeruddy-Cziffra* (n 9).
49 ibid [6.1].
50 ibid [5.2].
51 ibid [6.2].
52 ibid [9.2 (b) 2 (ii) 2].

Netherlands in relation to married women's social benefits symbolise the initial resistance of the authors towards collapsing complex claims, which aptly belonged to the intersection of sex, marital status, and socio-economic status or class, to simply one of those. Landmark decisions in *Broeks* and *Zwaan-de Vries*, decided on the same day in 1984, were both specifically argued on the grounds of 'sex and status' and 'sex and marital status' respectively – a point seldom noted about them. Both challenged the 'breadwinner' assumption in Dutch law which precluded married women from unemployment benefits because only men were supposed to be employed ('breadwinners') and hence eligible for unemployment benefits. Whilst both the claims succeeded— and rightly so— by extending the application of article 26 to socio-economic rights beyond the scope of the ICCPR,[53] the Committee reached a favourable outcome by essentially bypassing the claim of intersectional discrimination. It reduced the claimant's assertion of sex, *and* social and marital status to simply sex discrimination in both. In *Zwaan-de Vries*, as the record indicated: '[t]he author claim[ed] that the only reasons she was denied unemployment benefits are her sex and marital status and contend[ed] that this constitutes discrimination within the scope of article 26 of the Covenant.'[54] Despite this assertion, the Committee found that the impugned law violated article 26 because the author was 'denied a social security benefit on an equal footing with men.'[55] Although true, this represents only a half-truth in the circumstances of the claim. Not all women were denied an equal footing with men—it was specifically *married* women *in need of social benefits* because of their economic condition who were affected. Although they shared their material disadvantage with other single women and those dependent on social benefits, they suffered some unique disadvantages, like those which flowed from the impugned provision which specifically deprived them of benefits because of their intersectional status. In *Broeks*, the situation was further complicated by the fact that the author was disabled and was dismissed from her job, which is why she sought unemployment benefits. The exacerbation of the author's disadvantage because of her disability featured nowhere on record. The author however framed her claim as a matter of sex and marital status discrimination and explained that:

> if she were a man, married or unmarried, the law in question would not deprive her of unemployment benefits. Because she is a woman, and was married at the time in question, the law excludes her from continued unemployment benefits. This, she claims, makes her a victim of a violation of article 26 of the Covenant on the grounds of sex and [marital] status.[56]

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53 *Zwaan* (n 12) [12.1].
54 ibid [2.2].
55 ibid [15].
56 *Broeks* (n 12) [2.3].

The Committee responded by reducing the claim to a single ground of sex by proclaiming that: 'a differentiation which appears on one level to be one of [marital] status is in fact one of sex, placing married women at a disadvantage compared with married men.'[57] The comparison was under-inclusive in that it was not just married men to whom the 'breadwinner' assumption did not apply but all men and even unmarried women who did not have such a condition imposed in order to access unemployment benefits. In focussing on the 'breadwinner' assumption out of context, the Committee divorced the claim from implications of marriage upon women and their economic dependence on male spouses. As the forthcoming analysis shows, the failure to address the structural disadvantages faced by women in marriage continued in the numerous claims brought against the Netherlands, perhaps due to the piecemeal and abstract treatment of such claims which failed to address intersectionality each time.

The importance of reckoning with the causal basis of intersectionality – which reveals similar and different patterns of group disadvantage based on multiple grounds – can be particularly appreciated in communications which eventually failed in the absence of it. *Vos (Hendrika S)* represents an apt example of this. It involved a challenge to the legislative provision which disentitled disabled women of benefits under the General Disablement Benefits Act upon the death of their husbands and instead they got a lower level of pension under the General Widows and Orphans Act. The Committee rejected the author's argument that this constituted discrimination under article 26 based on 'sex and marital status.'[58] It was instead persuaded by the State's bipartite explanation that: (i) the General Widows and Orphans Act provided the disabled widows with benefits anyway and since disabled widowers were not entitled to claim benefits under it, there could not be any sex discrimination;[59] (ii) in any case, even if the level of benefits under the General Widows and Orphans Act was lower, the exclusion from the General Disablement Benefits Act (even if higher) was justified because it was merely a result of 'the application of a uniform rule to avoid overlapping in the allocation of social security benefits.'[60] Given that the purpose of both the legislations was beneficial in nature (ensuring benefits to all persons falling under subsistence level income), the impugned distinction was ultimately found to be 'objective and reasonable'.[61]

The problem with this reasoning is plain. The claim under article 26 is first seen as a simple case of sex discrimination, divorced from other relevant grounds of marital status, disability and reliance on social benefits. It is then defeated by a simplistic logic

57 ibid [14].
58 *Vos (Hendrika S)* (n 25) [2.5].
59 ibid [9.1].
60 ibid [12].
61 ibid.

which points to the equal exclusion of widowers from the lower rate of benefits under the General Widows and Orphans Act rather than tackling the argument about exclusion of disabled widows from the higher rate of benefits under the General Disablement Benefits Act—only the latter being the subject of discrimination being complained of. The claim was neither about distinction between disabled widows and disabled widowers nor about the distinction between disabled and non-disabled widows, but rather, as the dissenting opinion of Messrs Francisco Aguilar Urbina and Bertil Wennergren describes, concerned 'an indeterminate group of persons who fall in the category of disabled women entitled to full disability pensions.'[62] This group was denied their full disability benefits upon being widowed. The actual group and their disadvantage were thus defined not just by sex, disability, marital status, or reliance on social benefits but all of them at the same time. The intersectional discrimination was a result of the denial of full disability benefits to the author because she was now a widow.[63] The dissenting opinion thus found a violation of article 26 by appreciating this specific disadvantage suffered by the authors in light of: (i) the higher level of pension for disabled women because of their 'physical needs as disabled persons;'[64] (ii) the failure to make an exception for disabled widows was a failure to treat them on par with other disabled women getting full disability benefits;[65] and (iii) the deprivation of full disability benefits to widows as lacking an objective basis.[66] The brief but solid foundations of the dissenters' reasoning touched upon all grounds of sex, marital status, disability and need for benefits without privileging one or the other as the sole basis or ground of the challenge.

In the second instance – and in contrast with the continued diffidence towards intersectionality – appears the decision in *LNP* which was not only argued on multiple grounds but also responded to with a formidable intersectional analysis. The author complained of discrimination on the basis of sex and ethnicity in the handling of her rape complaint by the police and judicial system in Argentina. She substantiated her claim with specific instances which showed how she was targeted as a minor indigenous girl. These instances included: inordinate delay in responding to her complaint; lapses in investigation and unfair trial of her case as compared to rapes reported by women of the dominant community; the re-victimisation of the author by perpetrating negative stereotypes about her character and morals during the trial; and the use of Spanish throughout the process despite the protests of the author and her family that they did not understand Spanish as indigenous people. The author further

62 ibid (Appendix) [4].

63 *See also Cavalcanti Araujo-Jongen v the Netherlands* (1993) CCPR/C/49/D/418/1990, which was argued on the basis of 'sex in relation to (marital) status'. ibid [5].

64 *Vos (Hendrika S)* (Appendix) (n 25) [3].

65 ibid [4].

66 ibid [5].

elaborated the systemic nature of disadvantage suffered by indigenous women such that:

> her case is by no means exceptional, since Qom girls and women are frequently exposed to sexual assault in the area, while the pattern of impunity that exists in regard to such cases is promoted by the prevalence of racist attitudes. The author adds that, in the opposite case, when a Creole woman says that she has been raped by a Qom, he is immediately arrested and sentenced.[67]

The Committee agreed with all of the author's arguments and in the absence of any contestation by the State declared that the facts revealed 'discrimination based on the author's gender and ethnicity in violation of article 26 of the Covenant.'[68] While the Committee did not offer its own analysis of intersectional discrimination, its unreserved adoption of the pointed reasoning presented by the author is the first and only sign of an intersectionality-friendly stance in deciding an individual communication. The author's pithy account of intersectional discrimination – viewing instances of discrimination as causally accruing on the basis of both sex and ethnicity and specifically in relation to Qom women and different from the experience of others who access the criminal justice system, especially Creole women – remains a worthy instance of learning how intersectionality is done right: by making space for the specific explanations of the nature of intersectional discrimination based on multiple grounds.

3.2 *Potential intersectional claims*

In contrast with communications which explicitly considered multiple grounds of discrimination together, there are over a dozen communications where intersectionality, though apparently visible, remained wholly uncultivated. This was despite of the fact that these were claims where several of the claimants' identities seemed to be implicated in the way discrimination was suffered. While many of these claims succeeded anyway, six of them – all against the Netherlands – failed to impress in the absence of an intersectional analysis.

A unifying theme amongst these decisions is the case of discrimination against unmarried women, economically dependent on social assistance or on their partners in cohabitation or marriage-like relationships. The patterns of disadvantage created by the interwoven grounds of gender/sex, marital status, and poverty/class/socio-economic status/reliance on social status, seem to have been pressed neither by the authors nor examined by the Committee in its typically brief judgements. *Danning v*

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67 *LNP* (n 23) [2.7].

68 ibid [13.3].

the Netherlands,[69] *Sprenger v the Netherlands*,[70] *Hoofdman v the Netherlands*,[71] and *Derksen v the Netherlands*,[72] all failed without the appreciation of intersecting patterns of disadvantage based on multiple grounds. In *Danning*, the difference in treatment between married and unmarried couples in the distribution of disability benefits (where married couples received higher payment) was found not to be discriminatory under article 26. In *Sprenger*, the Committee upheld the limitation of co-insurance under the Health Insurance Act to spouses thereby denying the claim of a female cohabiting partner. *Hoofdman* denied the pension claim of an unemployed and dependent surviving partner who was not married to the deceased. *Derksen* confirmed the exclusion of unmarried female partners from claiming benefits because they were not married to their deceased partners.

All the claims were singularly argued on the ground of marital status and their reasoning follows identical trajectory—of applying the test of 'reasonable and objective criteria' in judging whether the distinction was sustainable under article 26. The Committee consistently found the marital status distinction to be based on such criteria. Any effort to understand the disadvantage suffered by unmarried women (except in *Hoofdman* where the author was male), especially due to their economically weaker and dependent positions, remains eerily absent. The fact that these claims were not simply about the distinction between married and unmarried people but about specific claimants who suffered disadvantage *because of* their own complex set of circumstances – being female, unmarried, and economically dependent – found no inlet in the decisions spanning over two decades of the Committee's discrimination work between 1984-2005.[73]

What is more puzzling though is that there is little difference between this set of failed claims and the successful ones, given their obvious factual similarities. *Ato del Avellanal v Peru*,[74] *Pauger v Austria*,[75] *Vos (AP Johannes) v the Netherlands*,[76] *Young v Australia*,[77] and *X v Colombia*[78] all considered claims by women or homosexual partners in marriage or marriage-like relationships. *Ato del Avellanal* concerned the denial of the right to sue for matrimonial property as a married woman. *Pauger* challenged the difference in scale of pension for widows versus widowers and *Vos (AP*

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69 *Danning v the Netherlands* (1987) CCPR/C/OP/2/205/1990.
70 *Sprenger v the Netherlands* (1992) CCPR/C/44/D/395/1990.
71 *Hoofdman v the Netherlands* (1998) CCPR/C/64/D/602/1994.
72 *Derksen v the Netherlands* (2004) CCPR/C/80/D/976/2001.
73 See also *Schmitz-de-Jong v the Netherlands* (2001) CCPR/C/72/D/855/1999 and *Jongenburger-Veerman v the Netherlands* (2005) CCPR/C/85/D/1238/2004.
74 *Ato del Avellanal v Peru* (1988) CCPR/C/34/D/202/1988
75 *Pauger v Austria* (1999) CCPR/C/65/D/716/1996.
76 *Vos (AP Johannes) v the Netherlands* (1999) CCPR/C/66/D/786/1997.
77 *Young v Australia* (2003) CCPR/C/78/D/941/2000.
78 *X v Colombia* (2007) CCPR/C/89/D/1361/2005.

Johannes) challenged the difference in scale of pension for married men versus married women. *Young* was about the denial of pension to same sex partners and *X v Colombia* about the denial of pension transfer to homosexual couples. The Committee found the distinctions in all these claims to be unsustainable, albeit on different grounds. While the Committee had found the distinctions between unmarried couples and married couples to be 'reasonable and objective' on the basis of marital status in *Sprenger*, *Derksen* and *Hoofdman*, it found the distinction between unmarried same-sex couples and married couples unsustainable on the ground of sexual orientation in *Young* and *X v Colombia*. The difference lies in the fact that *Young* and *X v Colombia* succeeded because the Committee entered into – what the (joint) concurring opinion of Mrs. Ruth Wedgwood and Mr. Franco DePasquale in *Young* described as 'a default judgement', i.e. the claim succeeded in the absence of any evidence adduced by the States to show that the distinction between same-sex and heterosexual couples was 'reasonable and objective.'[79] Similarly, in *Ato del Avellanal*, *Pauger* and *Vos (AP Johannes),* the Committee looked only at the authors' gender but not marital status, and found violations based on the denial of equality between men and women which provided a one-size-fits-all explanation for sex discrimination in article 26. In substantive terms, what this means is that: whilst the sexual orientation of couples mattered in determining the legality of denial of benefits in marriage like relationships in *Young* and *X v Colombia*, and gender mattered in claims relating to benefits in marriage like *Ato del Avellanal*, *Pauger* and *Vos (AP Johannes)*; gender and economic dependence of unmarried women did not factor in marital status discrimination claims like *Sprenger* and *Derksen*.

There are no ready explanations for the Committee's uneven handling of these complex discrimination claims which involve similar and several grounds of discrimination. Yet, what is apparent is the Committee's single-ground focus which belies intersectionality, where it considers only one ground as causing discrimination. This single-mindedness fails to explain key differences between the results in claims of unmarried couples where the claimants were women versus where the claimants were same-sex partners. The choice of a single ground – marital status, gender or sexual orientation – made by the claimants seems to have been determinative in the classification and final determination of the claims. A final example of *MT v Uzbekistan*[80] reveals the Committee's preoccupation with single-ground discrimination aptly. The author, who was a human rights activist, was assaulted, beaten and harassed multiple times by the police and State authorities, including with baseless arrests and investigations into her human rights activities. She was subjected to solitary confinement, tortured and gang raped in prison. She was also operated against her will and her uterus was removed. As a result, she had difficulty walking,

[79] *Young* (n 77) [10.4]; *X v Colombia*, ibid [7.2].
[80] *MT v Uzbekistan* (2015) CCPR/C/114/D/2234/2013.

significantly lost her eyesight, and suffered severe diabetes, depression, memory loss and anxiety.[81] The author argued that whilst all other treatment constituted discrimination on the basis of political opinion (because of her human rights campaigning), her gang rape and forced sterilisation was specifically a case of sex discrimination.[82] The Committee agreed with this distinction and found for sex discrimination. In upholding the author's contention, the Committee added: 'the involuntary sterilization together with the rape committed against the author show the *specific aggression against her as a woman*.'[83] The insistence on segregating the author's identities for the purpose of determining violations lacks basis. Causally, the author could not have been targeted *as a woman* with sexual assault and involuntary sterilisation, if she had not possessed the political opinion she did and acted as a human rights activist. The two seem intertwined in that the treatment meted out to the author was not *specifically* either as a woman or as an activist but as both at the same time. The lack of appreciation of this connection led the Committee member Dheerujlall Seetulsingh to proclaim in dissent that the sexual assault and forced sterilisation had in fact nothing to do with sex discrimination at all and were rather the domain of torture based on political opinion. Whilst he completely missed the gender dimension; the Committee's leading opinion missed the relevance of political opinion of the author as forming the basis of discriminatory treatment along with gender. In fact, the concurring opinion by Sarah Cleveland and Olivier de Frouville, also stressed on 'the peculiarly gendered nature of her abuse…because she was a woman.'[84]

The fastidious interest in segregating gender and gender-based crime from the effects of other enumerated grounds in article 26 like political opinion seems misguided, at least in causal or correlational terms for understanding why someone suffers discrimination at all. It is based on and reinforces the illusion that women either do not possess, or could not be targeted and raped for anything other than their sexuality especially not their political opinion. It basically thwarts intersectionality in its tracks by making all women's discrimination claims primarily about their sex, and consequently, seeing other grounds like marital status and political opinion to have nothing to do with sex or gender.

4. Fifty Years On and Beyond

The question that arises in learning that intersectionality has fallen through the cracks of the Committee's discrimination jurisprudence is why it matters to be reckoned with at all and how can this be realised. To wit, a claim may well succeed in terms of

81 ibid [2.14].
82 ibid [3.10].
83 ibid [7.6] (emphasis supplied).
84 ibid (Appendix II) [4].

obtaining the desired remedy under another right. For example, in the case of *MT v Uzbekistan* above, the net result of the Committee deciding on intersectionality via article 26 would have been the same as deciding on article 7 alone on the prohibition of torture. Further, even if such claims were instances of intersectionality 'proper', one may still ask why they cannot be substantially addressed via a single ground alone. For example, *Broeks* may have been a case of intersectional discrimination against married women based on marital status and gender both, but what was lost in addressing it basically as a matter of gender discrimination and finding in favour of the claimants? Even if one sees through the perspective of failed claims, a thorough single ground analysis of sex or marital status may have been sufficient in *Sprenger*, *Danning* and *Derksen* to match the successes in comparable claims like *Avellanal*, *Pauger* and *Vos (AP Johannes)*. Viewed through the lens of results, intersectionality's contribution may not be immediately apparent. Whilst its conceptual significance may not be lost upon claimants, their lawyers and the Committee members; its application in article 26 claims may seem too cumbersome, cosmetic, and ultimately irrelevant to the final outcome of the claim.

As this section hopes to show, this is a gross underestimation of the juridical significance of addressing intersectional discrimination in international law. Intersectionality matters in the way discrimination is examined and ultimately decided, such that genuine claims may not only succeed but their analyses look qualitatively different from an intersectionality-devoid perspective. The qualitative difference lies in addressing discrimination as more than just based on a single ground and looking at interactions between multiple grounds producing similar and different patterns of disadvantage which relates to redistribution, recognition, participation, and structural and systemic harms. Intersectional discrimination thus bids for complex forms of discrimination to be addressed in international law via mechanisms like the Human Rights Committee's communications procedure under the First Optional Protocol.

This bid may be limited by the Committee's procedural mandate under the First Optional Protocol which may be stretched thin in supporting an intersectional analysis. Section 4.1 first shows that the Committee's mandate, though agreeably restricted, is sufficiently malleable to allow complex cases of intersectional discrimination to be unravelled and responded to. Section 4.2 then considers the conceptual and doctrinal implications of responding to intersectional discrimination in article 26.

4.1 ***Situating intersectional discrimination in international law***

The framework of international law procedures is vastly different from the domestic adjudicatory models of discrimination law. In the context of the individual communication procedure under the First Optional Protocol of the ICCPR, there are

limitations of international law applied by and applicable to the Committee's work. Unlike national courts which have substantial leeway in regulating their own procedure, the Committee's procedure is not only mandated but strictly so. It can accept only written submissions, has no direct investigative powers and no possibility of conducting an adversarial hearing which allows listening to and speaking with the parties in determining the complaint.[85] Facts are established not in the way they normally are before regular courts but upon a reading of the parties' materials alone. Independent research of the Committee and its members, if pursued, appears minimal in the absence of references in the decisions. The Committee thus does not act as a judicial body under the Optional Protocol and its decisions are not actually binding in law.[86] The Committee in fact is not exclusively comprised of lawyers but 18 human rights experts.[87] The adopted decisions, even though reflective of human rights law, do not mirror established legal practice, especially in terms of providing a structured and detailed discrimination analysis of the claim. The decisions remain characteristically terse, presented on a standard template, with the final section on 'consideration of merits' in each decision seldom exceeding a paragraph or two at most, with a simple note of agreement or disagreement with the parties. The concluding paragraph on remedies is kept general, directing the state party to provide an effective remedy and prevent similar violations occurring in the future. The directions do not target intersectional claimants and those in their position in order to ameliorate their specific conditions of disadvantage.

The implications of this are visible in discrimination complaints, especially those of intersectional discrimination. In the absence of a culture of bringing and deciding intersectional claims, the facts and arguments on the subject remain thin. As seen in Section 3.2, even discrimination cases with obvious intersectional dimensions are not advanced as such. Given the lack of a possibility to intervene to clarify specific arguments on intersectional discrimination with the parties, the Committee has had to rely on what has been advanced in writing. Since the ICCPR and the Committee deal with a variety of rights, the Committee experts may also be limited in its capacity to explore specific ways of responding to intersectional discrimination in any other way.

And yet despite these limitations, the Committee's work under the Optional Protocol is considered, at least in practice, to be legal, judicial and binding. Since the 'Optional Protocol decisions apply the ICCPR in concrete situations, [they] deliver the most specific interpretations of the Covenant.'[88] The individual decisions 'exhibit some important characteristics of a judicial decision…arrived at in a judicial spirit, including

85 ICCPR, Part IV; First Optional Protocol, arts 1-5.

86 HRC, 'General Comment No 33: Obligations of State Parties under the Optional Protocol' (2008) CCPR/C/GV/33 [1.60].

87 ICCPR, art 28(2).

88 Joseph and Castan (n 17) [1.69].

the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.' [89] The Committee is believed to have produced 'a large body of jurisprudence touching on important aspects of most of the ICCPR… [and] has dealt with a large number of complicated issues, which have necessitated genuine findings of law.'[90] Its decisions are therefore strong indicators of legal obligations under the ICCPR, which in turn is binding.[91] The Committee has even instituted a 'follow-up' procedure taking stock of the state's performance of obligations under the decisions.

In this light, the Committee's handling of intersectional claims appears lightweight and deliberately so. The endless struggle with the Netherlands on the single issue of unmarried partners or married women's social benefits demonstrates how the Committee may have failed to intervene in a systematic manner to respond to established patterns of disadvantage suffered by the authors and those in their position.[92] The responsibility, as clear from *LNP*, has rested primarily with the authors (and their lawyers) to advance their claim with as much clarity and detail as possible. This includes clarity over how multiple grounds produce similar and different patterns of disadvantage and detailing such patterns with specific instances which show the nature of multi-layered discrimination suffered by the intersectional claimant. This responsibility, though, must be fairly distributed in two ways. First, instead of rejecting the complexity of the bid at hand, intersectional discrimination may be yet another instance requiring the Committee to be proactive under individual communications procedure, just as it has been in recognising other key concepts like indirect discrimination and affirmative action, and expanding the list of grounds under article 26 through its transformative jurisprudence.[93] As the article has shown, part of the problem in recognising intersectional cases has been the self-imposed normative limitation of discrimination to be based on a single ground alone. The Committee is well placed in expanding the boundaries of discrimination by admitting the possibility of discrimination to be based on multiple grounds. Secondly, this recognition must be substantively backed by a clear and accessible approach to article 26 which goes beyond the 'first generation' single-ground model to one which is more responsive to complex and pressing forms of discrimination. This is because despite the *de jure* limitations, if decisions on article 26, including those potentially involving intersectionality, carry remarkable weight like the rest of the Committee's

89 General Comment No 33 (n 86) [11].

90 Joseph and Castan (n 17) 26.

91 ibid [1.61].

92 *Jongenburger-Veerman* (n 73); *Derksen* (n 72); *Vos (AP Johannes)* (n 76); *Hoofdman* (n 71); *Cavalcanti* (n 63); *Zwaan-de Vries* (n 12); *Danning* (n 69); *Vos (Hendrika S)* (n 25); *Broeks* (n 12); *Sprenger* (n 70).

93 *Karnel Singh Bhinder v Canada* (1989) CCPR/C/37/D/208/1986 (indirect discrimination); *Ballantyne* (n 16) (affirmative action).

jurisprudence, they need to exude that weight internally from within. This involves a fundamental commitment to intersectionality and an appreciation of the substantive content of the right against discrimination in article 26. The next section considers this.

4.2 *Situating intersectional discrimination in article 26*

To remind, article 26 prohibits 'discrimination *on any ground*.' If one is allowed a semantic detour, it is useful to note that the verb form 'on' in this phrase links the fact of discrimination to listed grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. What it does is signify that discrimination is understood in terms of discriminatory criteria (direct discrimination) or discriminatory effects (indirect discrimination) *based on* grounds. This link, where the causation or correlation in the occurrence of discriminatory act or effects is centrally based on multiple grounds in a claim, is the kernel of intersectional discrimination under article 26. In fact, the grounds link between a discriminatory measure and its ensuing disadvantage is *the* kernel of 'discrimination' as such.[94] Discrimination *is* discrimination because of this link.

But this causal or correlational link with grounds is exactly what has been missed by the Committee in the individual communications considered above, except in *LNP*. Take for example, the recurring case before the Committee where an unmarried woman is denied her deceased partner's pension. The relevant authority may cite a variety of reasons for this: (i) it just does not have the money to approve any more pensions this year because of bankruptcy; (ii) it simply does not like the claimant; (iii) it does not give pensions to partners at all—whether married or not; (iv) it does not give pensions to women at all; (v) it does not give pensions to unmarried partners; (vi) it does not give pensions to unmarried partners but it leaves unmarried women worse off because they normally survive their male partners on whom they were economically dependent and have little choice in the decision of contracting a marriage. (i) and (ii) have nothing to do with 'discrimination' as defined above – because the actions and their effects are not based on any ground. (iii), too, may not have anything to do with grounds *per se*, unless it is shown that others in a similar position have been included and only partners/spouses are unfairly excluded on the basis of family status or such. In (iv), the prohibition does not distinguish between married and unmarried women but denies pension to all women *per se*. It is a case of direct sex discrimination proper. In the same vein, (v) is the case of direct marital status discrimination proper and this is how the Committee treated a host of similar cases – *Danning*, *Sprenger*, *Derksen* and *Vos (Hendrika S)*. And in all of them, the article 26 claim failed. The failure can be attributed to the lack of understanding and hence addressing the disadvantage specifically associated with the authors *as unmarried*

[94] Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 165–171.

women, on the grounds of marital status *and* sex; thus approaching the claim as a matter of (vi) rather than (v). That is, as a case of intersectional impact on unmarried women who were specifically affected by the exclusion, which exacerbated their socio-economic disadvantage as dependent female partners on the basis of both marital status and sex. The Committee may not have found that all unmarried or married persons, men and women, were disadvantaged by the exclusion from benefits associated with marriage. But it could have possibly found that claimants who were unmarried women were a special intersecting group between the groups of women and unmarried persons who suffered disadvantages specifically associated with their identities, including disadvantage relating to unequal power dynamics like the lack of choice in contracting marriage and economic dependence on male partners. Diagnostically speaking, their claims were thus *based on* both marital status and sex because of the distinct nature of disadvantage produced by the intersection of these grounds.

What comes through in this explanation is that: the distinct nature of intersectional discrimination lies in similar and different patterns of group disadvantage based on multiple grounds because these patterns reveal the actual disadvantage at play. But it is important to acknowledge that, as a corollary, if intersectionality does not specifically help getting at this actual disadvantage, it may not be an appropriate framework for the claim. Thus, intersectionality may not be equally relevant or useful in all cases which may, analytically speaking, be better off being addressed as claims of single-ground discrimination. *Amanda Jane Mellet v Ireland* is a classic example this.[95] *Mellet* concerned a challenge to the Irish laws which permitted abortion only where the life of the pregnant woman was at risk, leaving at risk women with other difficult and unwanted pregnancies such as those carrying fetuses with severe abnormalities. The HRC in *Mellet* found a breach of article 26 on the basis of two grounds—socio-economic condition and women who choose to terminate a non-viable pregnancy—which lead to an overly narrow ruling relating to a small cross section of women rather than women generally who face widespread discrimination in accessing abortion in Ireland. The concurring opinions of Yadh Ben Achour and Sarah Cleveland, and the joint concurring opinion Víctor Rodríguez Rescia, Olivier de Frouville, and Fabián Salvioli argued that the decision should have rightly been seen as sex discrimination against women *per se* rather than just the claimant and those in her position. Their argument was that while the specific instance of violation itself related to the claimant who was not socio-economically well off to travel abroad for an abortion needed for her near-fatal pregnancy, the discrimination she suffered was *based on* stereotypes related to *sex* and thus not confined to just that sub-group of women but to all women who suffered under Ireland's severely restrictive laws. In that sense, while intersectionality appeared to be facially relevant in this case, it was certainly not a case

[95] *Amanda Jane Mellet v Ireland* (2013) CCPR/C/116/D/2324.

of intersectional discrimination proper: that is, it was not causally, only *based on* a confluence or combination of grounds but one based squarely on sex.[96]

Thus, the conceptual framework of intersectionality only matters in cases where intersectionality helps grasp the *substantive* understanding of what discrimination in particular cases actually looks like. It is this substantive content which goes unidentified and unaddressed when the conceptual framework is not applied. The normative and substantive dimensions of discrimination reinforce each other in this way. Whilst this article has dealt with the (absence of) intersectional framework at length in the previous sections, it is also useful to highlight that the appreciation of intersectional discrimination involves not just an appreciation of intersectionality but of the substantive content of discrimination itself in article 26.

But the substantive understanding of discrimination remains rather underdeveloped in the Committee's jurisprudence. While article 26 did not itself say what discrimination really was, 'discrimination' was later defined in General Comment No 18 as that '*which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*.'[97] The potential of this explanation remains untapped to date and completely overshadowed by the final proclamation in General Comment No 18:

> the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[98]

The yardstick for measuring whether something is discriminatory has turned on the assessment of whether it is *reasonable and objective* rather than an impact analysis based on whether it *impairs the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*. Arguably, there is a dramatic difference between the two. The consideration of what is actually reasonable and objective can be completely transformed if measured from the standpoint of impairment of equal recognition, enjoyment and exercise of all rights and freedoms.[99] This, though, has not been the case. The focus has been on a general and vague standard of reasonable and objective without any correlation to the actual discriminatory impact on rights, the

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96 See esp the discussion in Fiona de Londras, 'Fatal Foetal Abnormality, Irish Constitutional Law, and *Mellet v Ireland*' (2016) 24 Medical Law Review 591.

97 General Comment 18 (n 10) [7].

98 ibid [13].

99 For a distinction between the two see Titia Loenen, 'The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13 South African Journal on Human Rights 401.

point of bringing, and adjudicating upon, a discrimination claim at all.[100] The Committee has thus upheld impugned actions in intersectional cases like *Schmitz-de-Jong*, *Derksen*, *Hoofdman*, *Cavalcanti*, *Danning*, *Vos (Hendrika S)* and *Sprenger*, because it considered the justifications offered by the Dutch government to be reasonable and objective. No real consideration of the actual 'impairment' of rights – social benefits granted under the national legislations – took place before launching into the question of whether such difference in treatment or impact could eventually be justified.[101] By frontloading the justification inquiry and completely obliterating the consideration of the impact of discrimination on the equal enjoyment of rights, the Committee has foregone developing a richer understanding of discrimination, intersectional or otherwise.

Coupled with this is the fact that 'reasonable and objective' is a rather low standard as compared to a higher standard of review like proportionality. Proportionality requires subjecting evidence to a multi-stage analysis of legitimacy, suitability, necessity and balancing;[102] whilst reasonable and objective standard is a highly deferential standard, operating as no more than an approval of whatever the State offers as the reason for differentiation.[103] Though the Committee has declared that discrimination on the basis of specific grounds enumerated in article 26, 'places a heavy burden on the State party to explain the reason for the differentiation,'[104] a higher standard of review in intersectional cases, even based on grounds explicitly listed in article 26, seems absent. Successful cases like *MT* and *LNP* applied no more than reasonable and objective standard for adjudicating the gravest of violations against women on the basis of their political opinion and ethnicity, respectively. But it was in unsuccessful cases with less obvious discriminatory actions (than sexual assault and forced sterilisation) like *Derksen* where a higher standard of scrutiny could weed out simplistic reasoning like extending 'earlier decisions in which the Committee [had already] reviewed the Dutch social security legislation' to conclude that the distinction between married and unmarried couples continued to survive as reasonable and objective even in the present claim.[105] Why the Committee considered the distinction reasonable at all is left for anyone to speculate. But the fact that the thin standard of

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100 Catherine Albertyn and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 South African Journal on Human Rights 149, 175.

101 Domestic courts have especially stressed on the importance of conducting impact analysis before pursuing justifications in discrimination claims. See *Harksen v Lane* NO 1998 (1) SA 300 (CC) [51]–[52] (Goldstone J); *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC) [81].

102 See for a detailed analysis of proportionality review Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012); Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174; Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1.

103 Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 182.

104 *Muller and Engelhard v Namibia* (2002) CCPR/C/74/D/919/2000 [6.7].

105 *Derksen* (n 72) [4.4] [9.2].

reasonableness could be passed by most governmental policies without much or simply by citing previously decided communications, makes it particularly problematic in being adopted as the touchstone for judging intersectional cases, just as it is for single ground cases. Retreating to a focus on discrimination and its impact is vital in setting straight the record on intersectionality.

It is useful to sum up. First, responding to the category of intersectional discrimination requires an appreciation of the framework of intersectionality—one based on multiple and intersecting grounds creating similar and different patterns of group disadvantage at the same time. Secondly, it is this framework which reveals the specific nature of intersectional disadvantage associated with the patterns. This disadvantage is complex and requires the Committee to step outside of its traditional mould of treating discrimination as a matter of reasonableness alone. Intersectional discrimination thus impinges on both the technical framework as well as the substantive content of discrimination under article 26.

5. Conclusion

Intersectionality remains largely wanting in the Human Rights Committee's jurisprudence other than the single instance of *LNP*. In *LNP*, the Committee decided the article 26 claim on the grounds of sex and ethnicity, subjecting them to an intersectional analysis of finding similar and different patterns of group disadvantage based on both the grounds. The lack of this approach in other similar cases is largely reflective of the lack of an understanding of intersectionality: that it contributes to a different category of 'intersectional discrimination' which is based on more than one ground and has a different character than single-ground discrimination. In failing to see that such a form of discrimination exists and what it means lies the Committee's basic error which is conceptual in nature. But the breakthrough in *LNP* provides the HRC a cue for transforming its record on the subject. The key to unlocking this potential remains in consistently looking for and appreciating both the nature of intersectionality and the purpose of prohibiting discrimination in a substantive way. Amongst other things, the legacy beyond the first fifty years of the ICCPR will be shaped by how the HRC responds to this challenge in order to address complex and crosscutting forms of discrimination.